IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 549

WALLY KELBERINE and LENKA BERLIN, ET AL.,
Petitioners

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A. (INTERHANDEL), a corporation organized under the laws of Switzerland, *Respondent*

and

NICHOLAS KATZENBACH, Attorney General of the United States, and

DOUGLAS DILLON, Secretary of the Treasury of the United States, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT SOCIETE INTERNATIONALE, ETC.,[1] IN OPPOSITION

QUESTION PRESENTED

The second question presented by Petitioners relates to this Respondent.[2] In this Respondent's opinion,

[1] This Respondent is frequently referred to as Interhandel, and may be so referred to herein.

[2] Questions 1 and 3 relate to the other Respondents who will doubtless discuss them, and this Respondent (Interhandel) will, therefore, abstain from commenting upon such questions.

the question is incorrectly phrased, and, based upon the record, should be stated as follows:

> Whether two victims of Nazi conspiratorial oppression during the years 1933-1945 can maintain a class tort action in an American federal court, filed in 1965 against a Swiss corporation defendant (Respondent Interhandel) as a tort-feasor alleged to be the creature of I.G. Farben, a member of the conspiracy, and sequester the Swiss corporation's funds obtained in a settlement with the United States Government under Section 9(a) of the Trading with the Enemy Act, where no equitable lien or other recognized right to specific property is involved, and where the Swiss corporation is sued merely as the creature of the alleged Nazi "master", and no misconduct is alleged against such defendant.

COUNTERSTATEMENT OF THE CASE

Since motions to dismiss were filed by all defendants in the District Court, the complaint has not been answered, and the averments of fact in the complaint will be accepted by this Respondent for the purposes of this Counterstatement, although many of the averments would be disputed in an answer. A fair summarization of the complaint[3] and of the district court proceedings was done by the Court of Appeals in the introductory paragraphs of its opinion, and in order to avoid repetition, this Court is respectfully referred to that summary.[4]

The complaint goes no further, insofar as Interhandel is concerned, than to allege that Interhandel "was a creature of I.G. Farbenindustrie A.G.". This

[3] The complaint is printed in Appendix A to this brief.

[4] The entire opinion is printed in Appendix B to this brief.

phrase is mentioned twice in the complaint, once in paragraph VIII (App. A, p. 3a) and again in paragraph XII (App. A, p. 5a). The Court of Appeals adopted the phrase in two instances in its opinion (App. B, pp. 10a and 16a). However, the petition for certiorari, in a number of instances, goes far beyond the mere "creature" averments of the complaint to exaggerate and expand the status of Interhandel.

The chief purpose of this counterstatement is to correct these gross misstatements by Petitioners in their petition, repeated several times. In the first question presented (Pet. p. 2) Petitioners are described "as victims of Defendant Interhandel *through its master* I. G. Farben" (Italics supplied). It will be seen from the complaint, and from the Court of Appeals' paraphrase of it, that Interhandel is not charged with any misconduct on its own part. It is merely that the sins of the "master" are visited upon its alleged offspring (creation).

The phrase in the second question (Pet. p. 3) is slightly changed to describe the Petitioners as the "victims of the *wrongdoings* of Defendant Interhandel *through its master* I. G. Farben (Italics supplied). The STATEMENT on page 4 of the petition opens with the same "through-its-master" phrase, but suddenly this concept is permanently abandoned, and the following distorted expressions are encountered on the same page:

> "* * * petitioners lost their property to the respondent Interhandel."
>
> "This is a suit for damages suffered by petitioners at the hands of respondent Interhandel * * *."
>
> "* * * The thory of the suit is that respondent Interhandel is a tort feasor which inflicted grievous

bodily harm upon the petitioners, converted their property and forced them to perform labor as slaves without just compensation."

Clearly, Interhandel, itself, is not charged in the complaint with any misconduct (App. A) If "master" means "creator", petitioners are suing Interhandel merely as the "creature" of Farben. If "master" is used in the "master-servant" concept, the servant is being sued for the alleged misconduct of the master. The property sought to be sequestered is not claimed to have been the product of "slave labor camps" or other atrocities; or, stated conversely, Petitioners make no claim that any losses sustained by them were converted into the vested property. They admit that the General Aniline shares belonged to Interhandel, and, more particularly, that the funds in the Treasury to the credit of Interhandel are Interhandel's property (Pet. pp. 4, 6). They concede the non-existence of an equitable lien. (See Court of Appeals opinion, App. B p. 16a). Their "personal sake" claim, citing *Baker* v. *Carr,* 369 U.S. 186, 7 L. Ed. 2d 663 (1962), is clearly inapplicable to the case at bar, and will doubtless be fully answered by the other Respondents as part of their opposition.

ARGUMENT

The opinion of the Court of Appeals is divided into four sections, marked by Roman numerals. Petitioners complain about sections III and IV. Section I is immaterial to the instant petition, and section II, relating to service of process upon Interhandel in the District of Columbia, is adverse to Interhandel, and is the subject of its pending petition for a writ of certiorari in case No. 539, October Term, 1966.

Section III of the opinion and paragraphs 2 (Pet. p. 7) and 3 (Pet. p. 10) of the REASONS FOR GRANTING THE WRIT, relate to the other Respondents, and Interhandel will abstain from discussing the subject matter thereof, other than to state that, in this Respondent's view, the lower court was clearly right and Petitioners are clearly wrong.

This Respondent (Interhandel) is concerned in this brief only with Section IV of the lower court's opinion and paragraph 1 (Pet. pp. 6-7), and the introductory paragraph which precedes it (Pet. pp. 5-6), of the REASONS FOR GRANTING THE WRIT chapter of the petition.

This Respondent pauses to point out the repetitious distortions again appearing on pages 5-6 of the petition, of the kind that have been called to the Court's attention in the foregoing Counterstatement. In the introductory paragraph (Pet. p. 5), the erroneous charge of "slave labor victims of respondent Interhandel" is repeated, followed by an anonymous reference to Farben, but in a context where the reader might think that the culprit is supposed to be Interhandel. Again, on page 6 of the petition, it is stated that the "wrongs" were "inflicted upon petitioners in Europe by respondent Interhandel." This has no support in the record unless it is so stated upon the basis of *reverse* vicariousness—creature liable for misconduct of creator; servant liable for acts of master—which, without more, is highly novel, unorthodox, and, indeed, unknown to the law of civilized countries.

Petitioners make no argument to support their attack upon the lower court's dismissal of their complaint on the ground that it does not constitute a justiciable

cause of action (Section IV of the opinion, App. B, p. 16a). They offer no precedent, judicial or otherwise, for what they wish to do. They seek certiorari for this Court to bring about "the development of a World Law" and "an International Rule of Law" as predicates for their recovery (Pet. p. 6). They call the question an important one of federal law (Pet. p. 6) when, of course, it is not.

No better reply can be made to Petitioners than the language of the Court of Appeals (App. B. p. 17a):

> "* * * the problem is not within the established scope of judicial authority. It did not arise under the Constitution or laws of the United States, or within the territorial jurisdiction of the courts of the United States."

The lower court said that the premises for the foregoing conclusions "are many and easily seen;" and then listed some of them as follows (App. B. p. 17a).

> 1. The span between the doing of the damage and the application of the claimed assuagement is too vague.
>
> 2. The time is too long.
>
> 3. The identity of the alleged tort feasors is too indefinite.
>
> 4. The procedure sought—adjudication of some two hundred thousand claims for multifarious damages inflicted twenty to thirty years ago in a European area by a government then in power—is too complicated, too costly, to justify undertaking by a court without legislative provision of the means wherewith to proceed.

And finally, the Court of Appeals remarked:

> "* * * The whole concept is too uncertain of legal validity to sustain the self-establishment of the proceedings by a court in the absence of specific legislative or executive formulation."[5] (App. B. p. 17a).

CONCLUSION

The petition should be denied.

Respectfully submitted,

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[5] For the sake of brevity, one may single out the shortest remark of the lower court as completely decisive of Petitioners' alleged cause of action—"The time is too long." Section 12-301 (formerly Section 12-201), D.C. Code, 1961 Edition, Supplement V, prescribes a 3-year limitation for the bringing of an action against tort feasors. There is no applicable tolling provision. Only Congress, not the courts, could change this.